



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
N. EUGENE AND I. SHAFER)

Appearances:

For Appellants: N. Eugene Shafer,
in pro. per.

For Respondent: Michael E. Brownell
John A. Stilwell, Jr.
Counsel

O P I N I O ' N

This appeal is made pursuant to section 13593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protests of N. Eugene and I. Shafer against proposed assessments of additional personal income tax and penalties in the total amounts of \$2,424.05, \$2,760.72, \$3,362.84 and \$3,635.89 for the years 1975, 1976, 1977, and 1978, respectively; and from the action of the Franchise Tax Board on the protest of N. Eugene Shafer against a proposed assessment of additional personal income tax and penalties in the total amount of \$4,359.89 for the year 1979.

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Respondent has no records of any returns being filed by appellants for 1975 and 1976. For the remaining years, Mr. Shafer filed separate return forms indicating his name, address, occupation, filing status and exemption credits. In the remaining blanks he wrote "none" or various forms of Fifth Amendment objections. The forms were signed and dated. Various memoranda were attached to the return forms. Mrs. Shafer did not file returns for any of the appeal years.

Respondent determined that the return forms did not constitute valid returns and demanded that appellants file proper returns for all the appeal years. When no returns were filed, respondent issued joint assessments of tax and penalties for failure to file a return, failure to file a return after notice and demand; negligence; and failure to pay estimated tax. In determining the amount of appellants' income, respondent determined that Mr. Shafer, who listed his occupation as "business man" and "self-employed" on the return forms, was, in fact, a financial consultant and an accountant. Based on this information, respondent used what it describes as "Average Annual Salaries for Selected Professional, Administrative and Technical Occupations 1967-1976" to determine Mr. Shafer's gross income. An inflation factor of ten percent was used for each succeeding year. Appellants' protests were denied, and this appeal followed.

Although Mr. Shafer has failed to offer any income information, he contends that respondent's proposed assessments are arbitrary and capricious since they lack any evidentiary basis. He also contends that his returns were properly filed and that he properly invoked his Fifth Amendment privilege against self-incrimination.

We first consider the claimed Fifth Amendment privilege against self-incrimination. We believe that section 3.5 to article III of the California Constitution precludes our resolution of this issue. Were we not so constrained, however, we would have no difficulty concluding that, based on the authority of United States v. Neff, 615 F.2d 1235 (9th Cir. 1980) cited as primary authority by appellant, the privilege against self-incrimination was improvidently claimed. In Neff the court noted that in order for the taxpayer to prevail, "there must be something peculiarly incriminating about his circumstances that justifies his reliance on the Fifth Amendment." (United States v. Neff, supra, at 1239.) The court then continued by setting forth the following pertinent Fifth Amendment principles.

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To claim the privilege validly a defendant must be faced with "'substantial hazards of self incrimination,'" (citation omitted) that are "'real and appreciable' and not merely 'imaginary and unsubstantial.'" (Citations omitted.) Moreover, **he** must have "reasonable cause to apprehend [such] danger from a direct answer" to questions posed to him. (Citation omitted.) The information that would be revealed by direct answer need not be such as would itself support a criminal conviction, however, but must simply "furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." (Citation omitted.) Indeed, it is enough if the responses would merely "provide a lead or clue" to evidence having a tendency to incriminate. (Citation omitted.)

In determining whether such a real and appreciable danger of incrimination exists, a trial judge must examine the "implications of the question[s] in the setting in which [they are] asked" (Citations omitted.) He **"[m]ust be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence."** (Citations omitted.) If the trial judge decides from this examination of the questions, their setting, and the peculiarities of the case, that no threat of self-incrimination exists, it then becomes incumbent "upon the defendant to show that answers to [the questions] might criminate him." (Citations omitted.) This does not mean that the defendant must confess the crime he has sought to conceal by asserting the privilege. The law does not require him "to prove guilt to avoid admitting it." (Citations omitted.) But neither does the law permit the defendant to be the final arbiter of his own assertion's validity. "The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself--his say-so does not of itself establish the hazard of incrimination. It is for the court to decide whether his silence is justified . . ." (Citation omitted.) (United State; v. Neff, supra, at 1239-1240.) (Emphasis added.)

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With these principles in mind, the court noted that the questions on the income tax form did not, of themselves, suggest that the responses would be incriminating. The court then concluded that since Neff made no positive disclosure that his response to the tax form questions would have been self-incriminating, he could not prevail on his Fifth Amendment claim. Here, appellant, like Neff, has failed to provide a positive disclosure that his answers would be self-incriminating. **Instead**, he has merely provided a generalized list of more than a dozen situations where a potential crime may possibly have been committed. Under these circumstances, appellant's Fifth Amendment claim is frivolous, at best.

Next, we turn to the question whether appellants have established any error in respondent's determination. It is well settled that respondent's determinations of tax and penalties are presumptively correct, and that the burden of proving them erroneous is upon the taxpayer. (Appeal of K. L. Durham, Cal. St., Bd. of Equal., March 4, 1980; Appeal of Harold G. Jindrich, Cal. St. Bd. of Equal., April 6, 1977.) In an attempt to sustain this burden, appellant has simply alleged that the proposed assessment; are arbitrary and capricious since they lack any evidentiary basis. However, appellant has failed to offer any evidence of what his income was.

Where a taxpayer refuses to cooperate in the ascertainment of his income by failing to file a proper return, respondent has great latitude in determining the amount of tax liability, and may use reasonable estimates to establish the taxpayer's income. (See, e.g., Joseph F. Giddio, 54 T.C. 1530 (1970); Norman Thomas, ¶ 80,359 P-H Memo. T.C. (1930); Floyd Douglas, ¶ 80,066 P-H Memo. T.C. (1980); George Lee Kindred, ¶ 79,457 P-H Memo. T.C. (1979).) In reaching these conclusions, the courts have invoked the rule that the failure of a party to introduce evidence which is within his control gives rise to the presumption that, if provided, it would be unfavorable. (See Joseph F. Giddio, supra, and the cases cited therein.) **When the taxpayer** fails to provide any evidence of his income, he is in no position to be hypercritical of respondent's labors. Since appellant has failed to present any evidence of his income for the appeal years, we must conclude that he has failed to carry his burden of proof.

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O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of N. Eugene and I. Shafer against proposed assessments of additional personal income tax and penalties in the total amounts of \$2,424.05, \$2,760.72, \$3,362.84 and \$3,635.89 for the years 1975, 1976, 1977, and 1978, respectively; and that the action of the Franchise Tax Board on the protest of N. Eugene Shafer against a proposed assessment of additional personal income tax and penalties in the total amount of \$4,359.89 for the year 1979, be and the same are hereby sustained.

Done at Sacramento, California, this 29th day of June , 1982, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Dronenburg and Mr. Nevins present.

-William M. Bennett , Chairman

Ernest J. -Dronenburg, Jr. , Member

-Richard Nevins , Member

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